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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 537.

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,

Appellant,

vs.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

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Appellant,

vs.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

The Appellant, The Second Federal Savings and Loan Association of Cleveland, in support of the jurisdiction of the Supreme Court of the United States to review this case on appeal respectfully represents:

OPINION BELOW.

The opinion of the Supreme Court of Ohio is officially reported at 168 O. S. 65 and unofficially at 151 N. E. 2d 223.

Application for rehearing was denied without opinion, by order unofficially reported in 31 Ohio Bar (July 7, 1958) 645. The opinion and judgment of the Court, and the decision of the Board of Tax Appeals which is not reported, are set forth in the Appendix. The decision of the Board quotes the entire final order of the Tax Commissioner.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Nature of Proceeding and Statutes Pursuant to Which Brought.

This cause is here on appeal from a final judgment of the Supreme Court of Ohio, the highest court of the State, affirming a decision of the Board of Tax Appeals of Ohio which had affirmed an order of the Tax Commissioner on Application for Review and Redetermination of an assessment of intangible personal property tax assessed against the Appellant as a financial institution for the year 1957.

The case originated with the timely filing by Appellant with the Tax Commissioner of Ohio (pursuant to R. C. § 5711.01) of an Application for Review and Redetermination of an assessment of intangible personal property tax against property of the Appellant as a financial institution for the year 1957. Appellant had filed its return for that year showing deposits as of November 21, 1956, taxable for the year 1957 in the amount of $48,211,460 and a tax thereon, at the rate of .002, in the amount of $96,422.92. That tax is not in dispute. The return also showed no capital employed (i.e., reserves and undivided profits) subject to tax and additional tax imposed by the statutes in question by reason of the fact that obligations of the United States Government and Federal instrumentalities owned by Appellant exceeded the book value of the capital employed. By his Correction Sheet, the Tax Commissioner added the sum of $3,946,000 for capital employed and by his "Preliminary Assessment Certificate" subjected it to two taxes—at the rate of .002 aggregating $7,892.00 and at the additional rate of .003 aggregating $11,838, or a total of $19,730; these are the taxes in dispute. The Application was based upon the fact that the taxes so assessed included

taxes upon United States bonds and stock of the Federal Home Loan Bank (a Federal government instrumentality) owned and held by Appellant and that the provisions of law under which ownership interests of depositors were assessed for purposes of taxation were unconstitutional and contrary to the decision of this Court in the cases of *Society for Savings in the City of Cleveland v. Bowers, Tax Commissioner*, and *First Federal Savings and Loan Association of Warren v. Bowers, Tax Commissioner*, 349 U. S. 143, 75 S. Ct. 607. (These cases will be hereinafter referred to as "Society for Savings" or "First Federal.") This Application was denied by the Tax Commissioner. The Tax Commissioner's order held:

> "that as an administrative official he is without authority to pass upon the question of the constitutionality of the statutes here involved, such being the province of the Courts alone."

Appellant filed timely Notice of Appeal (pursuant to R. C. § 5717.02) to the Board of Tax Appeals, an administrative tribunal in the Department of Taxation which, after hearing, held that it had no jurisdiction or authority to declare an act of the legislature to be unconstitutional and accordingly affirmed the order of the Tax Commissioner. Thereupon, Appellant appealed (pursuant to R. C. § 5717.04) to the Supreme Court of Ohio which affirmed the decision of the Board of Tax Appeals after finding that (p. 69):

> "the General Assembly has expressly supplied the deficiencies which the United States Supreme Court found [in Society for Savings and First Federal] in the then existing statutes."

The only questions raised in *Society for Savings* and *First Federal*, 349 U. S. 143, 173 S. Ct. 607, were whether the

statutes of Ohio were repugnant to the Constitution of the United States, Article I, Section 8, Article VI, second paragraph, and Section 1 of the Fourteenth Amendment and to U. S. Code Tit. 31, § 742. An application for rehearing was filed by Appellant and, on July 2, 1958, denied.

Dates of Judgment, Order Denying Rehearing and Notice of Appeal.

The judgment of the Supreme Court of Ohio which is here sought to be reviewed was dated June 4, 1958 but did not become final for the purpose of appeal until July 2, 1958 when Appellant's Application for Rehearing was denied. Notice of Appeal was filed in the Supreme Court of Ohio within 90 days thereafter as required by U. S. C. Title 28, § 2101 (c)—i.e., on September 26, 1958.

Statutory Provisions Conferring Jurisdiction.

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant cases is conferred by Tit. 28 U. S. C. § 1257 (2). If the appeal should be considered as having been improvidently taken, the Court is requested to consider such appeal as a petition for certiorari under Tit. 28 U. S. C. §§ 2103 and 1257 (3).

Cases Believed to Sustain Jurisdiction.

This Court has jurisdiction on appeal since Appellant timely asserted that the state law as applied to it violates the Federal Constitution and the highest state court rendered judgment against the claim of Federal right, *U. S. v. Allegheny County,* 322 U. S. 174, 192; 64 S. Ct. 908, 918.

The case is grounded squarely on the decisions of this court in *Society for Savings* and *First Federal,* 349 U. S. 143, 75 S. Ct. 607 which followed a long line of previous

cases. State taxation of bonds and stock of the United States and of Federal instrumentalities is an invasion of the fiscal powers of the United States under the Constitution, Article I, Section 8 and unconstitutional—*McCulloch v. Maryland*, 4 Wheat. 316; *Weston v. Charleston*, 2 Pet. 449; *Bank of Commerce v. New York City*, 2 Black 620, 629; *Bank Tax Case*, 2 Wall. 209-209; *Banks v. The Mayor*, 7 Wall. 16, 24; *Home Savings Bank v. Des Moines*, 205 U. S. 503; *New Jersey Title Insurance Co. v. Division of Tax Appeals*, 338 U. S. 665, 70 S. Ct. 413. Likewise such taxation is repugnant to the laws of the United States—*Home Savings Bank v. Des Moines*, 205 U. S. 503; *State of Missouri v. Gehner*, 281 U. S. 313, 50 S. Ct. 326; *New Jersey Title Insurance Co. v. Division of Tax Appeals*, 338 U. S. 665, 70 S. Ct. 413. Shares in the Federal Home Loan Bank, a federal government instrumentality, are exempt from State tax under the Federal statutes, *Rosch v. First Savings & Loan Assn.*, 203 S. W. 2d 1006, 1011.

The Supreme Court is never bound by the characterization or determination of the incidence of the state tax or the form in which the taxing scheme is cast, whether by state courts or legislatures, but will determine for itself the real nature, operation, substance and practical effect of the tax where the constitutionality of the tax is in question—*Society for Savings* and *First Federal*, 349 U. S. 143, 151, 75 S. Ct. 607; *United States, et al. v. Allegheny County*, 322 U. S. 174, 184; 64 S. Ct. 908, 914; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 49 S. Ct. 432; *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 362; *Carpenter v. Shaw*, 280 U. S. 363, 367; 50 S. Ct. 121, 123; *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 83; 67 S. Ct. 156, 164; *Senior v. Braden*, 295 U. S. 422, 430; 55 S. Ct. 800, 802; *N. J. Title Insurance Company v. Division of Tax Appeals*, 338 U. S. 665, 673, 70 S. Ct. 413, 417.

The double imposition of tax upon the same property is repugnant to the Fourteenth Amendment, *Senior v. Braden*, 295 U. S. 422, 430; 55 S. Ct. 800, 802.

Where a timely application for rehearing has been filed, as here, the finality necessary for review by the Supreme Court is deferred until the application is denied or until the power to act upon it has expired—*Chicago G. W. R. Co. v. Basham*, 249 U. S. 164, 166.

Provisions of the Constitution and Laws of the United States to Which the Statutes of Ohio and Judgment of the Supreme Court of Ohio are Repugnant.

The statutes of Ohio are repugnant to the Constitution of the United States, Article I, Section 8, Article VI, Paragraph 2, and Section 1 of the Fourteenth Amendment and to U. S. Code Title 31, Section 742 (R. S. 3701), the pertinent parts of which are quoted in the Appendix.

Statutes of the State of Ohio Validity of Which is Involved Herein.

The Statutes of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio as not being repugnant to the Constitution of the United States, are the statutes providing for and relating to assessment of intangible personal property taxes against financial institutions without capital stock upon account of the so-called "ownership interests" of depositors in the capital employed by them measured, in the case of Appellant, by its surplus or reserves and undivided profits, particularly R. C. §§ 5701.05, 5701.06, 5707.03, 5707.04, 5709.02, 5709.04, 5709.041, 5719.09, 5719.10, 5725.01, 5725.02, 5725.03, 5725.04, 5725.05, 5725.06, 5725.07 and House Bill No. 945 (126 O. L. Part II, p. 19).

The pertinent parts of these statutes, as well as others containing procedural provisions, are quoted in the Appendix.

QUESTIONS PRESENTED BY APPEAL.

The following questions are presented by this appeal:

1. Whether the incidence of the intangible personal property tax imposed by the statutes of Ohio upon property of incorporated financial institutions having no capital stock or shares (other than what were formerly known as withdrawable shares and are classed as deposits by the law, R. C. § 5701.05) measured by the aggregate amount of the capital, surplus or reserve fund and undivided profits, is upon the financial institution and its property or upon its depositors?

2. If the incidence of the tax is upon the financial institution—

   (a) Whether the statutes are repugnant to the Constitution (Article I, Section 8, and the Fourteenth Amendment) and laws (U. S. Code Tit. 31, § 742) of the United States, since deduction of the value of United States bonds and stock in Federal Government instrumentalities was denied?

   (b) Whether the statutes are repugnant to the Fourteenth Amendment since they deprive appellant of property without due process of law and result in the denial of the equal protection of the laws?

3. If the incidence of the tax is upon the depositors—

   (a) Whether the statutes and tax are repugnant to the Fourteenth Amendment to the Constitution of the United States since the tax exceeds any real value of the assumed ownership interests of the depositors in the reserves and undivided profits of the institution?

(b) Whether the statutes and tax are repugnant to the Fourteenth Amendment by reason of discriminatory taxation upon the taxable depositors in financial institutions having no capital stock as compared with exempt depositors in such institutions and with depositors in financial institutions having permanent capital stock or shares?

(c) Whether the statutes are repugnant to the Fourteenth Amendment by reason of discriminatory double or triple taxation upon the depositors with respect to the same property?

(d) Whether the statutes are repugnant to the Fourteenth Amendment since the tax must be paid in some instances without possibility of recoupment or reimbursement and since the provision for recoupment or reimbursement is illusory and unavailable as a practical matter in any case?

4. Whether the Supreme Court of Ohio by its decision, judgment and order misconstrued and misapplied the opinion and judgment of the Supreme Court of the United States in *Society for Savings in the City of Cleveland v. Bowers, Tax Commissioner,* and *First Federal Savings and Loan Association of Warren v. Bowers, Tax Commissioner,* 349 U. S. 143?

5. Whether the Supreme Court of Ohio failed to consider and pass upon the effect of, and results consequent upon, its conclusion that the statutes of Ohio impose taxes upon Appellant's depositors rather than actually upon Appellant itself in practical effect and thereby deprived Appellant and its depositors of property without due process of law and denied them the equal protection of the laws contrary to the Fourteenth Amendment?

STATEMENT OF THE CASE.

Appellant is a financial institution incorporated under he laws of the United States and resident in Ohio. It has o capital stock.

This appeal involves conflict with the Constitution nd Laws of the United States, of Statutes of Ohio which ave merely codified or enacted into law former decisions f the Supreme Court of Ohio in *Society for Savings v. eck*, 161 O. S. 122 and *First Federal v. Peck*, 161 O. S. 49, which this Court had reversed. The cases of *Society or Savings* and *First Federal* involved the statutes (prior o amendment) imposing intangible personal property tax pon the capital (reserves and undivided profits) of finan- ial institutions having no capital stock (sometimes called "mutuals") which the state court had construed as a tax pon the "ownership interests" of the depositors in the nstitution. This Court reversed the decisions of the Ohio ourt in *Society for Savings* and *First Federal*, 349 U. S. 143, 75 S. Ct. 607, holding (p. 154) that the tax was on he depositors in name only, and that for federal purposes t must be held to be on the banks themselves; whereupon the General Assembly of Ohio attempted to circumvent that decision by amending the statutes imposing taxes on financial institutions to provide specifically for a tax at the rate of .002 upon ownership interests of depositors in institutions having no capital stock; and enacted a further statute imposing an additional tax upon ownership interests in capital of .003 on the dollar in addition to the two mills theretofore imposed, in order to recoup the amount of taxes refunded by the state as a result of the decisions in *Society for Savings* and *First Federal*.

In *Society for Savings* and *First Federal* this Court said in part (349 U. S. 143 at 150; 75 S. Ct. 607 at 611)—

"The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility that hardly rises to the level of an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositor can readily transfer, any theoretical value reduces almost to the vanishing point. Cf. *Collett v. Springfield Savings Society*, 13 Ohio Cir. Ct. Repts. 131, aff'd 56 Ohio St. 776 (1897)."

That which has no value cannot be given value by statute. Again (at p. 151)—

"* * * The court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax. 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted. *Carpenter v. Shaw*, 1930, 280 U. S. 363, 367, 50 S. Ct. 121, 123, 74 L. Ed. 478. See also *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, supra, 338 U. S. at page 674, 70 S. Ct. at page 418; *Educational Films Corp. v. Ward*, supra, 282 U. S. at page 387, 51 S. Ct. at page 171. Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States.' *Missouri*,

ex rel. Missouri Ins. Co. v. Gehner, 1930, 281 U. S. 313, 321, 50 S. Ct. 326, 328, 64 L. Ed. 870."

That opinion involved a characterization by the state court which in this case was inserted in the statutes by the Legislature.

We quote further from the opinion (p. 151)—

"We note first that should the bank be unable to pay the tax after it has been assessed, there is no provision entitling the State of Ohio to collect it from the depositors. A tax against the depositors which is recoverable only from the bank looks like a tax against the bank."

Nor, indeed, is there any such provision in the amended statutes.

In its opinion in *Society for Savings* and *First Federal* (at pp. 152-153) this Court further noted the lack of provision for recovery by the taxpayer of the amount paid by it on account of so-called ownership interests of the depositors. The amended statutes paid lip service to this point and made nominal provision for reimbursement of the financial institution for taxes paid on depositors' ownership interests.

This pretended right of reimbursement is wholly illusory and if enforcement were attempted, would necessarily result in a general flight of deposits from the mutuals to other financial institutions doing business in the same way but having capital stock, or unincorporated banks, depositors in which are not taxable on any interest in capital, surplus or reserves and undivided profits. Obviously no one could claim that the depositors have any interest in the capital of any financial institution which has capital stock or of unincorporated banks. All Federal savings and loan associations, all mutual savings banks and many savings and loan associations organized under

state laws have no capital stock. On the other hand some state savings and loan associations and incorporated banks (other than mutuals) are organized with permanent capital stock, the amount of which may be small in relation to the amount of deposits; under no circumstances can the depositors in them be claimed to have any ownership interest in capital, surplus or reserves or undivided profits or in the property represented thereby or to be taxable on account thereof. Likewise in unincorporated banks, the individual proprietor, partners or shareholders are the direct owners of the bank, and of all its property including that represented by capital, surplus or reserves and undivided profits; a tax on such capital would be a direct tax on the Federal securities included therein and unconstitutional. In all such cases, the tax on depositors must be limited to the amounts credited to their accounts and withdrawable by them.

In addition to amending the existing statutes to enact into law the state court's construction of the statutes, the General Assembly enacted H. B. 945 (126 O. L. Part II, p. 19; Page's Ohio Revised Code Appendix B 6) to impose a third tax on depositors at the rate of .003 for three years on the amount of capital, reserves and undivided profits, in order to recoup the amount of taxes illegally assessed and collected within the preceding five year period and refunded as a result of the decision in *Society for Savings*. This is double taxation interdicted by this Court in *Senior v. Braden*, 295 U. S. 422, 429, 55 S. Ct. 800, reversing the decision of the Ohio Supreme Court in 128 O. S. 597 and holding that the imposition of Ohio intangible personal property tax upon investments in land trust certificates representing interests in lands which were also subject to real estate taxes is double taxation contrary to the Fourteenth Amendment.

Many deposits are exempt from taxation in Ohio such as property of Federal, State and Local governments, foundations and other institutions organized and operated for religious, charitable, scientific, educational and other similar purposes, deposits of non-residents and of residents having a situs outside Ohio. Exempt deposits in Appellant were over five per cent of the total, but there is no provision for exempting or excluding the amount of book value of assumed "ownership interests" in capital attributable to such deposits; indeed, to the contrary, R. C. § 5725.07 specifically provides for the assessment of:

> "all the taxable ownership interests of the depositors in the capital employed in such incorporated financial institution, the capital of which is not divided into shares or which has no capital stock, at the aggregate amount of the capital, the surplus or reserve fund and undivided profits as shown in such report."

Consequently, the taxable "ownership interests" of depositors were assessed by the statute at over 105% of the book value of the proportion of capital attributable to them in the instant case, thereby again resulting in denial of the equal protection of the laws.

Stage at Which Federal Questions Raised.

The Federal questions sought to be reviewed were raised at the following stages of the case:

(a) In administrative proceeding before the Tax Commissioner from whose finding we quote:

> "The Applicant filed its application for Review and Redetermination as provided in Section 5711.31, Revised Code, contending that the provisions of law under which ownership interests of depositors were assessed for purposes of taxation are invalid and unconstitutional."

(b) In Appellant's Notice of Appeal to the Board of Tax Appeals from which we quote in part:

> "1. The obligations of the United States Government and Federal Instrumentalities exceed the book value of the capital employed, and hence no valid tax in any amount could be assessed.
>
> "2. An invalid property tax was levied on the appellant's capital indirectly on the pretended 'ownership interests' of the depositors without excluding federal securities.
>
> "3. These federal securities so assessed are immune from state taxation.
>
> "4. If the depositors, in fact, had any real 'ownership interests' which appellant disputes, the assessment under review is invalid and void because such 'ownership interests' were entirely represented by federal obligations and the same could not be withdrawn and had no taxable value.
>
> "5. All provisions of law, including Sections 5701.06, 5707.03, 5709.02, 5725.04, 5725.07, 5725.08, 5725.22, 5725.24, 5719.09 and 5719.10 of the Revised Code of Ohio, under which so-called 'ownership interests' of depositors were assessed for purposes of taxation are invalid and unconstitutional."

In its opinion, the Board of Tax Appeals said in part:

> "It is noted that the appellant makes no claim that the assessment made by the Tax Commissioner is contrary to Ohio law. Its contention is that the law which first sets up 'ownership interests of the depositors' in financial institutions without shares of stock and then proceeds to tax said intangible interests, is void and unconstitutional insofar as the computation does not exclude obligations of the United States Government and Federal instrumentalities owned by the financial institution.
>
> "If the appellant's contention is correct, then the statutes providing for the assessment of the com-

plained of tax is unconstitutional, as applied to appellant's 1957 tax return.

"Appellant's total resources, as of December 31, 1956, amounted to $64,313,371.89, including obligations of the United States and Federal Instrumentalities in the amount of $7,810,748.10. Its reserve fund and undivided profits (capital) as of this same date was $3,945,999.96. If the Federal securities were deleted from the computation of appellant's resources the reserve fund and undivided profit account (capital) would be a negative figure and, therefore, there would be no capital available to tax."

"This constitutional question is interesting. However, the Board of Tax Appeals has no jurisdiction or authority to declare an Act of the legislature to be unconstitutional * * *."

(c) In the Notice of Appeal from the Board of Tax Appeals to the Supreme Court of Ohio and Assignment of Errors from which we quote:

"4. The Ohio Statutes under which so-called 'ownership interests' of depositors were assessed for purposes of taxation are invalid and unconstitutional.

"5. The Board of Tax Appeals erred in not excluding from book value of shares or capital employed the obligations of the United States Government and Federal instrumentalities owned by appellant.

"6. The levy and assessment of a tax was excessive and invalid, since said federal obligations exceeded appellant's reserve fund and undivided profit account (capital)."

(d) In the statement of Question Presented in the Brief of Appellant (as required by the Rules of the Supreme Court of Ohio—Rule II(b)) which we quote:

"Was the amendment by the General Assembly of Ohio to the applicable statutes, effective October 8, 1956, so as to assess the depositors, and place the incidence

of the tax upon them, on their so-called ownership interests in the financial institution a valid and constitutional enactment?"

This was elaborated in the Questions of Law Presented set forth in the Brief of Ohio Savings and Loan League, Amicus Curiae, in the same language as set forth in paragraphs 1, 2 (a), (b), 3 (a), (b), (c), (d) herein under the caption "Questions Presented by Appeal" (*supra*, pp. 7-8). These were expressly adopted by the Reply Brief of Appellant.

The opinion of the Supreme Court of Ohio states:

"The question presented is whether the amended tax statutes above referred to are constitutional."

Substantiality of Questions Involved.

This case involves the validity and constitutionality of state statutes imposing intangible personal property taxes on property of incorporated financial institutions having no capital stock, characterized by the Legislature as a tax upon ownership interests of depositors in capital employed, without deduction therefrom of United States bonds and stock in the Federal Home Loan Bank (a Federal government instrumentality) which are, under the Constitution and Laws of the United States, exempt from such taxes. In *Society for Savings* and *First Federal*, 349 U. S. 143, 75 S. Ct. 607, statutes imposing a similar tax similarly characterized by the State Court were held unconstitutional by this Court. The taxes assessed against the deposits and ownership interests of depositors exceed by more than 20 per cent the taxes which could be constitutionally imposed.

Prior to enactment of Federal statutes exempting such securities from state taxation it had been held that such taxation invades the fiscal powers of the Federal govern-

ment and is repugnant to the Constitution of the United States, Article I, Section 8 and the supremacy clause of the Constitution, Article VI, paragraph 2.

Because the imposition of state tax on Federal securities owned and held by Appellant is unlawful and unconstitutional, the statutes of Ohio construed to permit such imposition deprive Appellant of its property without due process of law and deny it the equal protection of the laws. They are, therefore, repugnant also to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The ownership interests of depositors have no real or theoretical value and the taxes, accordingly, deprive them of property without due process of law contrary to the Fourteenth Amendment.

The attempt by the statutes of Ohio to circumvent the exemption under the Federal statutes and Constitution of Federal securities by enacting that the tax is not on property of Appellant against which it is assessed, but is imposed upon the ownership interests of the depositors in reserves and undivided profits, in addition to the tax upon the deposits owned by the same depositors, is as substantial a question as was that involved in *Society for Savings* and *First Federal* in which the state court had similarly construed the statutes prior to amendment involved in the case at bar.

The statutes tax the so-called ownership interests of approximately 95 per cent of the depositors in Appellant at 100 per cent of the book value of reserves and undivided profits and thereby deprive Appellant and its depositors of property without due process of law and deny them the equal protection of the laws.

All Federal savings and loan associations, mutual banks, unincorporated banks and state savings and loan

associations not having capital stock, located in Ohio, are affected by the unconstitutionality of the statutes.

There is no distinction between the statutes involved in the case at bar and those involved in *First Federal* and *Society for Savings* other than the fact that the characterization of the tax as against the depositors' "ownership interests" in the surplus, reserves and undivided profits was placed in the statute after similar characterization by the state court was held unconstitutional and the fact the statutes were amended to provide nominally for passing on the tax to the depositors, which, as we have shown under the caption "Statement of the Case" is purely illusory.

The statutes involved herein would discriminate against depositors in mutual institutions, each of whom would be taxed not only upon the value of his deposits, but also upon a portion of the reserves and undivided profits at the rate of .002, and again at the rate of .003 as compared with depositors in other financial institutions taxed under the same law but having capital stock and in unincorporated financial institutions. In the other cases the depositors could only be taxed upon the value of their deposits as shown in their passbooks. This imposes double or triple taxation upon Appellant's depositors and results in denying to Appellant and its depositors the equal protection of the laws as compared with other institutions having permanent capital stock or unincorporated banks. The nominal provision for passing on the tax on ownership interests of the depositors in reserves and undivided profits is purely illusory.

It should be obvious that the questions involved are substantial.

With the ever increasing expense of operation of the Federal government, its ever growing financial participa-

tion in international activities beyond the borders of the United States and the myriad other requirements of government, the importance of protecting the fiscal powers of the United States becomes ever greater. The ability to finance its requirements by the issue and sale of bonds freely and free from taxation by the states which might diminish in the slightest degree the market value or investment attractiveness of Federal securities is of the utmost importance. The question is of continuing importance and not limited to the particular years and amount involved herein.

CONCLUSION.

WHEREFORE the Appellant Second Federal Savings and Loan Association of Cleveland respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal; and that if the appeal should be considered as having been improvidently taken the Court should consider it as a petition for certiorari; all for the reasons stated herein and prays that the final judgment of the Supreme Court of Ohio be reversed and for such other relief as may be fit and proper.

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APPENDIX.

OPINION OF THE SUPREME COURT OF OHIO.

Statement of the Case.

THE SECOND FEDERAL SAVINGS & LOAN ASSN. OF CLEVELAND, APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

Taxation—Financial institutions without capital stock—Ownership interests of depositors—Federal securities as part of assets—Computation of net worth—Federal securities included in computation—Statutory construction.

(No. 35434—Decided June 4, 1958.)

APPEAL from the Board of Tax Appeals.

This case involves the 1957 tax return of the appellant, The Second Federal Savings & Loan Association of Cleveland, an incorporated financial institution without shares of capital stock. In making its return for 1957, the appellant listed no taxable amount for book value of capital employed, for the reason that the federal securities held by it exceeded the value of the capital employed. The only matter in issue is the tax of $19,730 assessed against the "ownership interests of the depositors," upon the basis of the surplus or reserve and undivided profits without deduction of federal securities owned by the appellant.

The appellant filed an application for review and redetermination, contending that the statutory provisions under which ownership interests of depositors were assessed are unconstitutional. The Tax Commissioner found that he was without authority to pass on the question of the constitutionality of the statutes involved; that as an administrative official he must proceed in accord with the

statutory provisions; and that the assessment was correct.

The confirmance of the assessment by the Tax Commissioner was made pursuant to certain statutory provisions relative to the taxation of shares of, and capital employed by, financial institutions, contained in an act (126 Ohio Laws, pt. 2, 12) amending, among others, Sections 5709.02, 5719.09, 5719.10, 5725.04 and 5725.07, Revised Code.

On appeal, the Board of Tax Appeals held that it was without authority to declare a statute unconstitutional, considered all applicable sections of the Revised Code to be constitutional, and affirmed the order of the Tax Commissioner.

[66] An appeal from the decision of the Board of Tax Appeals brings the cause to this Court for review.

Messrs. Lawrence & Bates, for appellant.

Mr. William Saxbe, attorney general, *Mr. John M. Tobin* and *Mr. C. Emory Glander,* for appellee.

Per Curiam. The question presented is whether the amended tax statutes above referred to are constitutional.

These statutes, before their amendment, were considered by the Supreme Court of the United States in *Society for Savings in the City of Cleveland v. Bowers, Tax Commr.*, 349 U. S., 143, 99 L. Ed., 950, 75 S. Ct., 607. That court held that the tax as imposed by the then existing statutes on the ownership interests was on the financial institution itself and not on the depositor, and that federal securities could not be included in the computation of the capital.

In the opinion by Mr. Justice Harlan it is stated:

"The Supreme Court of Ohio recognized that this tax, based as it was upon the inclusion of federal obligations, would have to fall if directed against the banks. * * * Hold-

ing that the depositors of a mutual savings bank have an interest similar to that of shareholders of other banks, the Ohio court found instead that the tax was imposed upon the 'intangible property interests' of the depositors as the owners of each bank. The banks' capital, surplus fund and undivided profits, which we will refer to as their surplus, were regarded as not themselves the subject matter of the tax, but as simply the measure of the tax against the depositors, and the banks were treated as tax-collecting agents rather than as taxpayers.

"In so deciding the Ohio court relied upon a gloss on the rule of immunity stated above. It has been held that a state may impose a tax upon the stockholders' interests in a corporation, measured by corporate asset values, without making any deduction on account of United States securities held by the corporation. * * * The result is that when * * * the shareholder tax is measured solely by corporate asset values, such a tax is difficult to distinguish from a tax imposed upon the corporation itself, so far as the practical impact of the two types of taxes [67] upon corporate-owned federal obligations is concerned. Nevertheless, this exception to the general rule of immunity is firmly imbedded in the law.

"* * * The statute is barren of any language expressly imposing this tax on the depositors, and contains no provision giving the bank any right to recover the tax from the depositors, as might be expected if the bank had been regarded as a mere tax-collecting agent. * * *

"* * *

"* * * In assessing the validity of the tax under federal law, we are not bound by the state's conclusion that the tax is imposed on the depositors * * *.

"* * * should the bank be unable to pay the tax, after it has been assessed, there is no provision entitling

the state of Ohio to collect it from the depositors. A tax against the depositors which is recoverable only from the bank looks like a tax against the bank. And if the tax is in fact against the bank, it does not matter whether the ultimate economic impact is passed on to the depositors. * * *

"Next, it appears that the statute does not relieve the bank from having to pay the tax on the 'intangible property interest' of a depositor who had an account with the bank on the assessment date of the tax, but has withdrawn his account before the collection date. And if the bank is required to pay on the former depositor's account, there is no provision entitling the bank to reimbursement from him. * * *

"* * *

"Without provisions protecting the bank against the burdens of the tax, we can not assume that the statute's operation will not infringe on the immunity of the federal obligations held by the banks. * * *

"We conclude that this tax is on the depositors in name only, and that for federal purposes it must be held to be on the banks themselves."

That language indicates an acknowledgment that the state has the power to tax intangible interests of ownership in an incorporated financial institution without shares of capital stock and use the net worth of the institution as a measure of value for taxation without excluding federal securities owned by the [68] institution, but indicates that under the then existing statutes it had not done so.

After that decision was rendered, the General Assembly amended the statutes (126 Ohio Laws, pt. 2, 12, *supra*) by expressly and definitely supplying the deficiencies found by the federal Supreme Court.

Section 5709.02 now provides in part that "ownership interests of the depositors in incorporated financial institutions located in this state, the capital of which is not divided into shares, or which have no capital stock, as such ownership interests are defined in Sections 5725.04 and 5725.07 of the Revised Code, shall be subject to taxation."

Section 5725.04, as amended, provides that there shall be listed and assessed at book value "all the ownership interests of the depositors in the capital employed in an incorporated financial institution located in this state, the capital of which is not divided into shares, or which has no capital stock," and defines such capital as "the ownership interests of the depositors in such incorporated financial institution and not any of the capital or property of or belonging to such incorporated financial institution."

Section 5725.07, as amended, requires the Tax Commissioner to assess "all the taxable ownership interests of the depositors in the capital employed in such incorporated financial institution, the capital of which is not divided into shares, or which has no capital stock," on the basis of the surplus or revenue fund and the undivided profits, and that such assessment "shall be deemed to constitute an assessment of the intangible interests of ownership of the depositors in such incorporated financial institution and not an assessment of any of the capital or property of or belonging to such incorporated financial institution."

Section 5719.09 now provides that the taxes thus assessed shall be a lien on the ownership interests.

Section 5719.10, as amended, provides that the institution which pays the taxes so assessed on such ownership interests "may charge the amount thereof to depositors * * * and deduct the amount thereof from the deposit of each such depositor * * * and shall have a lien upon

such deposit * * * ownership interest of such depositor, and all funds in its possession belonging [69] to such depositor * * * for reimbursement of the taxes payable or paid," and that "such lien may be enforced in any appropriate manner."

By these and other amended statutes (126 Ohio Laws, pt. 2, 12, *supra*), the General Assembly has expressly supplied the deficiencies which the United States Supreme Court found in the then existing statutes.

The decision of the Board of Tax Appeals is affirmed.

Decision affirmed.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

STEWART, J., not participating.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered June 4, 1958.)

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein.

ORDERED, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

ENTRY OF THE BOARD OF TAX APPEALS.

(Entered October 30, 1957.)

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of September 18, 1957, by the appellant above named from a final order of the Tax Commissioner dated August 20, 1957, in and by which final order the Commissioner denied appellant's application for review and redetermination of a tax assessment made against it as a financial institution for the year 1957.

The final order of the Tax Commissioner reads as follows:

> "This proceeding, being the application of The Second Federal Savings and Loan Association of Cleveland, Cleveland, Ohio, for review and redetermination of a tax assessment made against it as a financial institution for the year 1957, after being duly heard, came on to be considered.
>
> "In making its return for the year 1957, the applicant listed no taxable value for 'Book Value of Shares or Capital Employed as of December 31, 1956,' and noted therein that Obligations of U. S. Government and Federal Instrumentalities exceed Book Value of Shares or Capital Employed.' Upon audit, acting pursuant to the provisions of Sections 5725.04 and 5725.05, Revised Code, the Department determined the 'ownership interests of the depositors' to be the total book value of applicant's capital employed as of December 31, 1956. The applicant filed its application for review and redetermination as provided in Section 5711.31, Revised Code, contending that the provisions of law under which ownership interests of depositors were assessed for purposes of taxation are invalid and unconstitutional.
>
> "Being fully advised in the premises, the Tax Commissioner finds that as an administrative official

he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77; State ex rel. Davis v. Hildabrant, 94 Ohio St. 154; 114 N. E. 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St. 225, 28 N. E. 2d 599; Argo v. Kaiser, 66 O. L. Abs. 538, 118 N. E. 2d 162. Accordingly, the Tax Commissioner finds the assessment here under review to be proper and correct.

"Finding no error in the assessment as heretofore made, it is the order of the Tax Commissioner that such assessment be, and the same hereby is, affirmed."

This appellant says that the final order of the Tax Commissioner is erroneous in the following respects:

"1. The obligations of the United States Government and Federal Instrumentalities exceed the book value of the capital employed, and hence no valid tax in any amount could be assessed.

"2. An invalid property tax was levied on the appellant's capital indirectly on the pretended 'ownership interests' of the depositors without excluding federal securities.

"3. These federal securities so assessed are immune from state taxation.

"4. If the depositors, in fact, had any real 'ownership interests,' which appellant disputes, the assessment under review is invalid and void because such 'ownership interests' were entirely represented by federal obligations and the same could not be withdrawn and had no taxable value.

"5. All provisions of law, including Sections 5701.06, 5707.03, 5709.02, 5725.04, 5725.07, 5725.08,

5725.22, 5725.24, 5719.09 and 5719.10 of the Revised Code of Ohio, under which so-called 'ownership interests' of depositors were assessed for purposes of taxation are invalid and unconstitutional."

The cause was submitted to the Board of Tax Appeals on the notice of appeal and the transcript furnished by the Tax Commissioner. The parties, through their counsel, have stipulated that no additional evidence is to be offered and that the Board should decide the case on the documents now before it.

The appellant has no capital stock and is a "financial institution" within the definitions set out in Revised Code Section 5725.01. Within the time prescribed by law it caused to be filed with the Tax Commissioner the "Financial Return of Taxable Property for 1957" wherein it computed and paid $96,422.92 as tax on its deposits as of November 21, 1956. As to this tax, there is no dispute.

Upon audit of the tax return, the Tax Commissioner made an additional assessment against the appellant on the basis of the "ownership interests of the depositors" of the appellant financial institution as of December 31, 1956, amounting to $3,946,000.00, against which sum he proceeded to levy the 2 mill tax ($7,892.00) provided by Revised Code Section 5707.03, and the 3 mill tax ($11,838.00) provided by Amended House Bill No. 945 adopted by the 101st Ohio General Assembly, effective for the period July 6, 1956, to September 1, 1959. The total tax of $19,730.00 levied and assessed against the "ownership interests of the depositors" is the only matter in issue in this appeal.

It is noted that the appellant makes no claim that the assessment made by the Tax Commissioner is contrary to Ohio law. Its contention is that the law which first sets up "ownership interests of the depositors" in financial in-

stitutions without shares of stock and then proceeds to tax said intangible interests, is void and unconstitutional in so far as the computation does not exclude obligations of the United States Government and Federal instrumentalities owned by the financial institution.

If the appellant's contention is correct, then the statutes providing for the assessment of the complained of tax is unconstitutional, as applied to appellant's 1957 tax return.

Appellant's total resources, as of December 31, 1956, amounted to $64,313,371.89, including obligations of the United States and Federal Instrumentalities in the amount of $7,810,748.10. Its reserve fund and undivided profits (capital) as of this same date was $3,945,999.96. If the Federal securities were deleted from the computation of appellant's resources the reserve fund and undivided profit account (capital) would be a negative figure and, therefore, there would be no capital available to tax.

This constitutional question is interesting. However, the Board of Tax Appeals has no jurisdiction or authority to declare an Act of the legislature to be unconstitutional. The Board of Tax Appeals, being a quasi-judicial body, must and does consider all sections of the Revised Code to be constitutional enactments. In this connection see *National Distillers Products Corporation v. Glander*, 49 Abs. 330, 337; *Hillsborough Twp. v. Cromwell*, 326 U. S. 620, 625; 90 L. Ed., 358, 364; *Schwartz v. Essex County Board of Taxation*, 120 N. J. L. 129, 132, affirmed 130 N. J. L. 177. In the case last above cited it was said:

> "It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi-judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given

piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified body."

Upon consideration of the matter as thus presented to it, the Board of Tax Appeals finds that the Tax Commissioner committed no error in his final order inasmuch as he was proceeding under the assumption that the assessment statutes in question were constitutional. The final order of the Tax Commissioner is, therefore, affirmed.

(Duly certified.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution, Article I, Section 8:

"The Congress shall have power * * *

"To borrow Money on the credit of the United States;"

Constitution, Article VI, Paragraph 2:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fourteenth Amendment, Section 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Code, Title 31, § 742:

"*Exemption from taxation.* Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. (R. S. § 3701.)"

Revised Code of Ohio:

(Matter added by amendments effective October 8, 1956 will be shown in italics.)

§ 5701.05 "*Deposits defined.* As used in Title LVII of the Revised Code, 'deposits' includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account, certificates of running, or other withdrawable stock, or otherwise excepting:

"(A) Unearned premiums and surrender values under policies of insurance;

"(B) Such deposits in financial institutions outside this state as yield annual income by way of interest or dividends in excess of four per cent of the principal sum so withdrawable."

§ 5701.06 *"Investments defined.* As used in Title LVII of the Revised Code, 'investments' includes:

"(A) Shares of stock in corporations, associations, and joint-stock companies, under whatever laws organized or existing, excepting:

* * * * *

"(3) Those defined as deposits by section 5701.05 of the Revised Code.

"(B) Interest-bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures, and notes; certificates of deposit, savings, and other like deposits in financial institutions outside this state yielding income by way of interest or dividends in excess of four per cent of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage of or lien upon real or personal property or income, by whomsoever issued, excepting those issued:

* * * * *

"(5) Which are defined in sections 5701.05 and 5701.07 of the Revised Code as deposits * * *.

* * * * *

"(5) Ownership interests of the depositors in an incorporated financial institution, the capital of which is not divided into shares, or which has no capital stock, as such ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code."

§ 5707.03 *"Tax on property on intangible property tax list.*

"Annual taxes are hereby levied on the kinds of intangible property, enumerated in this section, on the intangible property tax list in the office of the auditor of

state and the duplicate thereof in the office of treasurer of state at the following rates:

"(A) On investments, five per cent of income yield or of income as provided by section 5711.16 of the Revised Code;

"(B) On unproductive investments, two mills on the dollar;

"(C) On deposits, two mills on the dollar;

"(D) On shares of, *ownership interests in capital employed by,* and capital employed by, financial institutions, two mills on the dollar;

* * * * *

"The object and distribution of such taxes shall be as provided in section 5725.24 of the Revised Code."

§ 5707.04 *"Tax levy on intangible property on classified tax list; rates.* Annual taxes are hereby levied on the kinds of intangible property, enumerated in this section, on the classified tax list in the office of the county auditor and the duplicate thereof in the office of the county treasurer at the following rates:

"(A) On investments, five per cent of income yield or of income as provided by section 5711.10 of the Revised Code;

"(B) On unproductive investments, two mills on the dollar;

"(C) On deposits, two mills on the dollar;

"(D) On money, credits, and all other taxable intangibles listed with the auditor, three mills on the dollar

"The object and distribution of the taxes so levied shall be as provided in section 5707.05 of the Revised Code."

§ 5709.02 "All money, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, except as provided in this section or as otherwise provided or exempted in Title LVII of the Revised Code; but the good will, license, or franchise of a business, whether granted by governmental authority or otherwise, shall be considered property separate from the other property used in or growing out of such business. Property of the kinds mentioned in section 5709.03 of the Revised Code, used in and arising out of business transacted in this state by or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5725.01 of the Revised Code, and nonwithdrawable shares of stock of financial institutions and dealers in intangibles located in this state *and ownership interests of the depositors in incorporated financial institutions located in this state, the capital of which is not divided into shares, or which have no capital stock, as such ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code,* shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by or on behalf of such persons, and nonwithdrawable shares of stock of financial institutions located outside of this state *and ownership interests of the depositors in incorporated financial institutions located outside of this state, the capital of which is not divided into shares, or which have no capital stock, as such ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code,* belonging to persons residing in this state, shall not be subject to taxation. Such property subject to taxation shall be entered on the classified tax list and duplicate of taxable property, or on the intangible property tax list in the office of the auditor of

tate and the duplicate thereof in the office of the treasurer f state.

"A corporation shall not be required to list any of i's nvestments in the stocks of any other corporation or in its wn treasury stock."

§ 5709.04 "*Exemption of intangible property of charitable associations.* Money, credits, investments, deposits, nd other intangible property belonging, either legally or eneficially, to corporations, trust, associations, funds, oundations, or community chests, organized and operated xclusively for religious, charitable, scientific, literary, ealth, hospital, educational, or public purposes, exclusively for the prevention of cruelty to children or animals, r exclusively for contributing financial support to any uch purposes, no part of the net earnings of which inures o the benefit of any private shareholder or individual, and o substantial part of the activities of which is carrying on ropaganda or otherwise attempting to influence legislaion, shall not be subject to taxation."

§ 5709.041 "*Exemption of certain deposits.* Deposits o the extent they represent funds required to be collected r withheld as taxes levied upon persons other than the depositor by federal, state or local governmental authority, nd deposits not used in business to the extent they represent funds belonging beneficially to non-residents of Ohio, whether or not any such funds are on deposit in or utside of Ohio, are not subject to taxation."

§ 5719.09 "*Tax lien on nonwithdrawable shares and ownership interest of depositors.* Taxes assessed on nonwithdrawable shares of stock of a financial institution *and on the ownership interests of the depositors in an incorporated financial institution, the capital of which is not divided into shares, or which has no capital stock, as such*

ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code, shall be a lien on such shares and on such ownership interests from the first day of January in each year until they are paid.

"Every financial institution shall collect the taxes due upon its shares of stock from the several owners of such shares *and the taxes due upon the ownership interests of its depositors from the several depositors in such financial institution* which fails to pay said taxes as provided in this section shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock *and from all the depositors as owners of such ownership interests*, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

§ 5719.10 "A financial institution which pays *or is required to pay* to the treasurer of state the taxes assessed upon its shares in the hands of its shareholders, as provided in section 5719.09 of the Revised Code may *charge the amount thereof to shareholders of record on the first day of January in each year and* deduct the amount thereof from dividends that are due or thereafter become due *to such shareholders* on such shares, and shall have a lien upon the shares of stock and on all funds belonging to such shareholders in its possession, or which may come into its possession, for reimbursement of the taxes *payable or* paid on account of the several shareholders, with legal interest. Such lien may be enforced in any appropriate manner.

"A financial institution which pays or is required to pay to the treasurer of state the taxes assessed upon the ownership interests of its depositors, as provided in section 5719.09 of the Revised Code, may charge the amount thereof to depositors determined as of the first day of January in each year and deduct the amount thereof from the

deposit of each such depositor or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, and shall have a lien upon such deposit, interest, dividends, the ownership interest of such depositor, and all funds in its possession belonging to such depositor, or which come into its possession, for reimbursement of the taxes payable or paid on account of the several depositors, with legal interest. Such lien may be enforced in any appropriate manner."

§ 5725.01 "*Definitions.* As used in sections 5725.10 to 5725.26, inclusive, of the Revised Code:

(A) 'Financial institution' includes every person who keeps an office or other place of business in this state and engages in the business of receiving deposits, lending money, and buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness with a view to profit. Corporations or institutions organized under the 'Federal Farm Loan Act' and amendments thereto, and insurance companies shall not be considered financial institutions or dealers in intangibles within the meaning of such sections.

(B) 'Dealer in intangibles' includes every person who keeps an office or other place of business in this state and engages at such office or other place in the business of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptance, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks, or other investment securities, whether on his own account with a view to profit, or as agent or broker for others, with a view to profit or personal earnings. Dealer in intangibles excludes institutions used exclusively for charitable purposes, insurance companies, and financial

institutions. Neither casual nor isolated transactions of any of the kinds enumerated in this division of this section, nor the investment of funds as personal accumulations or as business reserves or working capital constitutes engaging in business within the meaning of this division of this section; but a person who, having engaged in the business of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness on his own account, remains in business for the purpose of realizing upon the assets of such business is deemed a dealer in intangibles, though not presently engaged in lending money or discounting or buying such securities."

§ 5725.02 "*Annual report of financial institution.* The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager, or owner of each other unincorporated financial institution shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding.

"The report of each financial institution shall also show the aggregate balances of the taxable deposits of its depositors in each county in which the institution maintained an office for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5725.05 of the Revised Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on

which notice of the fixing was received by such institution, or if no such notice was received, then between the day fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day fixed."

§ 5725.03 "*Return of deposits by financial institutions.* The deposits required to be returned by financial institutions pursuant to sections 5725.01 to 5725.26, inclusive, of the Revised Code, include all deposits as defined by section 5701.05 of the Revised Code to the extent that such deposits are made taxable by section 5709.02 of the Revised Code, except:

"(A) Deposits belonging to the federal government or any instrumentality thereof;

"(B) Deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies, or the furnishing of services pursuant to authority of any act to further the war effort;

"(C) Deposits belonging to the state or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, dealer in intangibles, domestic insurance company, or institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit of any class required to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items credited thereto, one half of the amount so represented shall be considered as withdrawable and shall be included in arriving at the aggregate

balance of taxable deposits required to be returned, whether or not the depositor is permitted to make withdrawals against the amount so represented and credited."

§ 5725.04 "*Taxable property of financial institutions.* All of the shares of the stockholders in a financial institution located in this state, incorporated or organized under the laws of the state or the United States, the capital stock of which is divided into shares, except shares defined as deposits in Section 5701.05 of the Revised Code, and all the shares of the stockholders in an unincorporated financial institution located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, *and all the ownership interests of the depositors in the capital employed in an incorporated financial institution located in this state, the capital of which is not divided into shares, or which has no capital stock*, and the capital employed, or the property representing the capital, in * * * *any other* financial institution located in this state, the capital of which is not divided into shares, or which has no capital stock, shall be listed and assessed at the book value thereof, and taxed in the manner provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code.

"*The capital employed in an incorporated financial institution located in this state, the capital of which is not divided into shares, or which has no capital stock, shall be deemed to mean and describe the ownership interests of the depositors in such incorporated financial institution and not any of the capital or property of or belonging to such incorporated financial institution.*"

§ 5725.05 "*Duty of the board of tax appeals to fix listing day for deposits; notice.* On or before the fifth day of December, annually, the board of tax appeals shall fix

the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day fixed shall be between the first and the thirtieth days of November, inclusive, and the action of the board shall be taken not more than five days after the day fixed. Notice of such action shall be immediately given to each financial institution and to the county auditor of each county by registered mail, and the date fixed shall be printed or stamped on the forms of return to be made by all financial institutions * * *."

§ 5725.06 *"Taxes charged for collection.* In the month of June, annually, the auditor of state shall charge for collection:

(A) From each financial institution and dealer in intangibles, the taxes levied by section 5707.03 of the Revised Code upon the amounts assessed by the tax commissioner pursuant to sections 5725.01 to 5725.26, inclusive, of the Revised Code, and certified to him;"

§ 5725.07 *Assessments by tax commissioner.* Upon receiving the report required from a financial institution by section 5725.02 of the Revised Code, the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, *or all the taxable ownership interests of the depositors in the capital employed in such incorporated financial institution the capital of which is not divided into shares, or which has no capital stock,* or the value of the property representing the capital employed by such *other* financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund, and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution

except that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5725.02 of the Revised Code, and separately set forth in such report, shall be subtracted from the amount of taxable deposits so assessed, and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5701.05 of the Revised Code, *or the capital of which is not divided into shares, or which has no capital stock*, such assessment of shares *or ownership interests* shall exclude the capital stock, but shall include the surplus or reserve and undivided profits.

"The assessment hereunder of the ownership interests of the depositors in the capital employed in an incorporated financial institution, the capital of which is not divided into shares, or which has no capital stock, shall be deemed to constitute an assessment of the intangible interests of ownership of the depositors in such incorporated financial institution and not an assessment of any of the capital or property of or belonging to such incorporated financial institution."

House Bill 945, 126 O. L. pt. II, p. 19:

"Section 1. *Tax on financial institutions.* For the use of the general revenue of the state, a tax is hereby levied upon shares of, ownership interests in capital employed by, and capital employed by financial institutions at the rate of three mills on the dollar. This tax shall be reported, assessed, computed, paid, administered, collected, enforced and subject to the same exemptions and penalties as provided in sections 5719.09 to 5719.12, inclusive, and 5725.01 to 5725.26, inclusive, of the Revised Code as if such sections were specifically set forth herein, except that any

certificate of abatement issued pursuant to section 5703.05 of the Revised Code for the overpayment of the tax levied hereby may be tendered by the payee or transferee thereof to the treasurer of state as payment, to the extent of the amount thereof, of any tax payable to the treasurer of state to the credit of the general fund in the state treasury. The tax imposed by this section shall be in addition to the taxes imposed by section 5707.03 of the Revised Code.

"Section 2. *Use of revenue.* The tax levied by section one of this act shall be for the use of the general revenue fund of the state and shall be paid into the state treasury.

"Section 3. That this act shall be in effect until September 1, 1959.

"Section 1 effective July 6, 1956; Sections 2 and 3 effective October 8, 1956."

PROCEDURAL STATUTES.

§ 5711.31. *Appeal to commissioner from assessment; hearing; certificate of determination; tender of tax.*

Whenever the assessor shall assess any property not listed in or omitted from a return, or whenever the assessor shall assess any item or class of taxable property listed in a return by the taxpayer in excess of the value or amount thereof as so listed, or without allowing a claim duly made for deduction from the net book value of accounts receivable, or depreciated book value of personal property used in business, so listed, the assessor shall give notice thereof to the taxpayer by mail. Within thirty days after the mailing of such notice such taxpayer may make

application in writing to the tax commissioner for review and redetermination of the assessments so made. The mailing of the notice prescribed in this section shall be prima-facie evidence of the receipt of the same by the person to whom such notice is addressed. Upon the filing of such application, the commissioner shall fix a time and a place not more than fifty miles distant from the taxpayer's residence, or at the office of the commissioner in Columbus if such taxpayer consents thereto in writing, at which the taxpayer may be heard, and shall give reasonable notice thereof by mail to the taxpayer. At such hearing the commissioner may make such correction in the assessment, including any penalty, as he deems lawful and proper, or he may affirm the assessment. In either event the commissioner shall transmit a certificate of his determination to the taxpayer, and if no appeal is taken therefrom as provided by law, or upon the final determination of an appeal which may be taken, he shall transmit a copy of such certificate to the auditor of state or to the proper county auditor, who shall make up or correct his records and tax lists and duplicates in accordance therewith.

* * * * *

§ 5717.02. *Appeals from final determination of the tax commissioner; procedure; hearing.*

Appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by him may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the direc-

tor of finance if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.

Such appeals shall be taken by the filing of a written notice to that effect with the board and with the commissioner within thirty days after notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner has been given or otherwise evidenced as required by law. The notice of such appeal shall set forth, or have attached thereto and incorporated therein by reference, a true copy of the notice sent by the commissioner to the taxpayer of the final determination complained of, and shall also specify the errors therein complained of.

* * * * *

§ 5717.04 *Appeal from decision of board of tax appeals to supreme court; parties who may appeal; certification.*

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation or modification shall be by appeal to the Supreme Court or * * *.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by him may be

instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determined the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of finance, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the commissioner.

* * * * *

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. Such notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by registered mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appel-
nt, shall within thirty days after the filing of such de-
and file with the court to which the appeal is being
ken a certified transcript of the record of the proceed-
gs of the board pertaining to the decision complained of
nd the evidence considered by the board in making such
ecision.

If upon hearing and consideration of such record and
vidence the court decides that the decision of the board
ppealed from is reasonable and lawful it shall affirm the
ame, but if the court decides that such decision of the
oard is unreasonable or unlawful, the court shall reverse
nd vacate the decision or modify it and enter final judg-
ment in accordance with such modification.

The clerk of the court shall certify the judgment of
the court to the board, which shall certify such judgment
to such public officials or take such other action in con-
nection therewith as is required to give effect to the de-
cision. The "taxpayer" includes any person required to
return any property for taxation.

* * * * *

DEC 29
JAMES R. BROWNING

No. 537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Appeal from the Supreme Court of Ohio

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

MOTION TO DISMISS

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IN THE

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OCTOBER TERM, 1958

No. . . . . .

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS

Appellee in the above styled case, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

Following the decision of this Court in *Society for Savings in the City of Cleveland* v. *Bowers, Tax Commissioner*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, the General Assembly of Ohio was called into special session. On June 29, 1956, Amended House Bill No. 944 was enacted. This

bill was approved by the Governor of Ohio on July 6, 1956, and became effective on October 8, 1956.

This amendment to the Ohio tax structure was a legislative attempt to conform the Ohio laws pertaining to financial institutions to the decision of this Court referred to above. The Sections of the Ohio Revised Code affected by Amended House Bill No. 944 were: Sections 5701.06, 5707.03, 5709.02, 5719.09, 5719.10, 5725.04, 5725.07, 5725.08, 5725.22, and 5725.24.

On the basis of these amended statutes, the Tax Commissioner of Ohio issued an assessment against The Second Federal Savings and Loan Association of Cleveland, an incorporated financial institution without shares of capital stock. Upon review and redetermination of the assessment, the Tax Commissioner affirmed the assessment made upon the ownership interests of the depositors in the capital employed in appellant's financial institution without deduction on account of federal securities owned by appellant.

The Tax Commissioner's determination was affirmed on appeal to the Ohio Board of Tax Appeals. The constitutional question raised by appellant was not passed upon inasmuch as the Board held that it was without authority to determine the constitutionality of an act of the General Assembly.

The Supreme Court of Ohio noting that the pertinent statutes prior to amendment had been considered in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, used this Court's decision and the amended forms of the statutes as the foundation for its opinion.

The appellant has filed its jurisdictional statement herein contending that the determination of the Supreme Court of Ohio was erroneous, that the question involved was substantial, and that this Court should accept jurisdiction of this appeal so as to correct the errors of the Ohio Supreme Court.

ARGUMENT

Appellant attempted unsuccessfully to expand the scope of its appeal before the Supreme Court of Ohio. The errors as originally assigned pertained only to a general allegation of unconstitutionality. Appellant's original brief in the Ohio Supreme Court contained a like allegation and its argument was based upon this Court's decision in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, plus the claim that the value of its federal securities exceeded its capital.

The questions now claimed presented were first identified in the brief amicus curiae. Appellant then attempted to expand the scope of appeal by filing an amendment and supplement to its assignment of errors. This attempt was opposed by the appellee and disapproved by the Ohio Supreme Court. Likewise, following the decision of the Ohio Supreme Court appellant again attempted an expansion of its appeal by presenting to the Chief Justice of the Ohio Supreme Court a certification of questions raised. This attempt was also refused. Thus the single question properly raised is whether the amended Ohio statutes are improper on the basis of this Court's opinion in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950.

The appellant at page 9 of its jurisdictional statement states that this appeal is concerned with the constitutionality of statutes of Ohio "which have merely codified or enacted into law former decisions of the Supreme Court of Ohio." This remark is characteristic of appellant's approach to the problem and overlooks the basic tenet of the General Assembly of Ohio. While it is true that a portion of the amended statutes made explicit that which the Supreme Court of Ohio found implicit in the statutes involved

in *Society for Savings* v. *Peck*, 161 Ohio St., 122, 118 N. E. 2d, 651. The basic concern of the General Assembly in the enactment of Amended House Bill No. 944 was to cure the defects identified by this Court in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950.

Initially it may be observed that under Section 2 of Article XII of the Ohio Constitution the General Assembly has the power to determine the subjects and methods of taxation of personal property limited only by Article I of the Ohio Constitution. *State, ex rel. Struble*, v. *Davis*, 132 Ohio St., 555, 9 N. E. 2d, 684; *State, ex rel. Williams*, v. *Glander*, 148 Ohio St., 188, 74 N. E. 2d, 82. The appellant has made no claim that the assessment against it is contrary to Ohio law or to the Ohio Constitution.

The opinion of the Ohio Supreme Court in *Second Federal Savings & Loan Assn.* v. *Bowers*, 168 Ohio St., 65, states at page 66 that:

> "These statutes, before their amendment, were considered by the Supreme Court of the United States in Society for Savings in the City of Cleveland v. Bowers, Tax Commr., 349 U. S., 143, 99 L. Ed., 950, 75 S. Ct., 607. That court held that the tax as imposed by the then existing statutes on the ownership interests was on *the financial institution itself and not on the depositor*, and that federal securities could not be included in the computation of the capital." (Emphasis added.)

The Ohio Court later observed at pages 67 and 68 of its opinion that:

> "That language indicates an acknowledgment that *the state has the power to tax intangible interests of ownership in an incorporated financial institution without shares of capital stock and use the net worth of the institution as a measure of value for taxation without excluding federal securities* owned by the institution, but indicates that under the then existing statutes it had not done so." (Emphasis added.)

In its opinion in *Society for Savings*, 349 U. S., 145, 75 S. Ct., 607, 99 L. Ed., 950, this Court took especial pains to point out the inadequacies inherent in the Ohio statutes. As observed earlier, the General Assembly of Ohio in special session attempted to correct the defects as identified by this Court. The Supreme Court of Ohio after quoting the crux of this Court's opinion carefully spelled out the correcting features of the amended statutes. The pertinent language of the opinion of the Supreme Court of the United States appears at pages 146 to 154 and reads:

"The Supreme Court of Ohio recognized that this tax, based as it was upon the inclusion of federal obligations, would have to fall if directed against the banks. * * * This Tax, though, was not considered to be against the banks. Holding that the depositors of a mutual savings bank have an interest similar to that of shareholders of other banks, the Ohio court found instead that the tax was imposed upon the "intangible property interests' of the depositors as the owners of each bank. The banks' capital, surplus fund and undivided profits, which we will refer to as their surplus, were regarded as not themselves the subject matter of the tax, but as simply the measure of the tax against the depositors, and the banks were treated as tax-collecting agents rather than as taxpayers.

"In so deciding the Ohio court relied upon a gloss on the rule of immunity stated above. It has been held that a state may impose a tax upon the stockholders' interests in a corporation, measured by corporate asset values, without making any deduction on account of United States securities held by the corporation. * * *

"* * * The statute is barren of any language expressly imposing this tax on the depositors, and contains no provision giving the bank any right to recover the tax from the depositors, as might be expected if the bank had been regarded as a mere tax-collecting agent. * * *

"* * * * * * * * * * *

"We not * * * that should the bank be unable to pay the tax, after it has been assessed, there is no provision entitling the State of Ohio to collect it from the depositors. A tax against the depositors which is recoverable only from the bank looks like a tax against the bank. And if the tax is in fact against the bank, it does not matter whether the ultimate economic impact is passed on to the depositors. * * *

"Next, it appears that the statute does not relieve the bank from having to pay the tax on the 'intangible property interest' of a depositor who had an account with the bank on the assessment date of the tax, but has withdrawn his account before the collection date. And if the bank is required to pay on the former depositor's account, there is no provision entitling the bank to reimbursement from him. It should be observed that in the case of the deposit tax the statute does contain provisions protecting the bank in such a situation.

"Finally, and perhaps most important, if this tax is on the depositors, we must find somewhere a right in the bank to make itself whole from the depositors for the taxes paid on their account. * * *

"* * * * * * * * * * * *

"Without provisions protecting the bank against the burdens of the tax, we cannot assume that the statute's operation will not infringe on the immunity of the federal obligations held by the banks. * * *

"We conclude that this tax is on the depositors in name only, and that for federal purposes it must be held to be on the banks themselves. * * *"

Section 5709.02, Revised Code of Ohio, as amended, expressly subjects to taxation the ownership interests of depositors in incorporated financial institutions without shares in the same manner as shares of stock in incorporated financial institutions having shares.

Sections 5707.03 and 5725.04, Revised Code of Ohio, as amended, expressly provide that the tax herein levied shall be upon the ownership interests of the depositors in capital

employed by financial institutions without shares and not on any property of the corporation, thus making it clear that the tax is not levied upon any property of or belonging to such corporation.

Section 5719.10, Revised Code of Ohio, as amended, supplies specific and complete assurance that the impact of the tax is upon the depositors as of the day the state's lien attaches, January 1, that the impact of the tax will be upon them rather than the financial institution itself, and additionally that persons becoming depositors after January 1 bear no part of the tax for the current year. Financial institutions are given the right to charge the tax to depositors determined as of January 1, the right to deduct the amount thereof from their deposits, interests, or dividends, and a fully enforceable lien upon such deposits, interests and dividends. It therefore appears certain that the financial institution itself is fully protected against the burdens of the tax.

Section 5719.09, Revised Code of Ohio, as amended, makes provision for the same lien and collection procedures which are applicable to financial institutions having shares, in that the statute expressly provides that taxes assessed on the ownership interests of the depositors in an incorporated financial institution without shares shall be a lien on such ownership interests from the first day of January in each year, and that such financial institution shall collect the taxes due upon the ownership interests of its depositors from such depositors.

Finally, Section 5725.07, Revised Code of Ohio, as amended, expressly requires the Tax Commissioner to ascertain and assess "the taxable ownership interests of the depositors in the capital employed in such incorporated financial institution the capital of which is not divided into

shares" on the basis of the surplus and undivided profits. This statute further provides that the assessment of such ownership interests "shall be deemed to constitute an assessment of the intangible interests of ownership of the depositors in such incorporated financial institution and not an assessment of any of the capital or property of or belonging to such incorporated financial institution."

Thus it can be seen that the objections to the former Ohio statutes which this Court found in *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, have been removed. This Court noted that the Ohio statutes contained no language expressly imposing the tax on the depositors; that there were no provisions giving the bank the right to recover the tax paid from the depositors; that in the event the bank was unable to pay the tax, the Ohio statutes contained no provision entitling the State of Ohio to collect such tax from depositors; that the statutes failed to relieve a bank from payment of tax on the intangible property interests of the depositor who had withdrawn his account prior to collection date, and if the bank were required to pay on such former depositor's account, the Ohio statutes contained no language providing for reimbursement to the bank from such depositor; and that if the tax were on the depositor the statutes failed to provide a right in the bank to make itself whole from the depositor for the taxes paid on his account. We believe that we have demonstrated herein that these flaws have been corrected in the amended statutes, and that the laws in effect during the Tax Commissioner's assessment were not violative of constitutional protections.

CONCLUSION

It is respectfully submitted that the General Assembly of Ohio, by amendment, fully and adequately conformed the within involved statutes to this Honorable Court's enumerations in the *Society for Savings*, 349 U. S., 143, 75 S. Ct., 607, 99 L. Ed., 950, so that the statutes do not infringe appellant's constitutional liberties. This appeal does not present a substantial federal question, and therefore, the appeal should be dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 537.

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,

Appellant,

vs.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

REPLY BRIEF IN SUPPORT OF JURISDICTION.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8947

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 537.

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,

Appellant,

vs.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

REPLY BRIEF IN SUPPORT OF JURISDICTION.

Appellee's Motion to Dismiss is based only on the claim that the appeal does not present a substantial Federal question. It is not claimed that the Federal questions sought to be reviewed were not timely or properly raised or passed upon or that the judgment rests on an adequate non-federal basis. Appellee states in argument (p. 3):

> "Thus, the single question properly raised is whether the amended Ohio statutes are improper on the basis of this Court's opinion in *Society for Savings,* 349 U. S., 143, 75 S. Ct. 607, 99 L. Ed. 950."

(p. 4):

> "The appellant has made no claim that the assessment against it is contrary to Ohio law or to the Ohio Constitution."

Thus, it is conceded by Appellee that this case involves the same questions as were presented in the cases of *Society for Savings* and *First Federal.*

The Ohio court in its opinion disregarded the holding of this Court in *Society for Savings* and *First Federal*, 349 U. S. 143, 150; 75 S. Ct. 607, 611, in substance that the asserted property interests of depositors in the surplus of the institution are without any real or theoretical value. The state court seemed to read the opinion of this Court as holding the former law of Ohio unconstitutional only because it failed to make express provision for recovery of the tax from the depositors after payment by the institution. To read it as an acknowledgment that the State may tax to the depositors supposed ownership interests which are without value to them is not justified.

We submit that the state court was not justified in considering some, and ignoring other, questions involved. Once having determined that the amended statutes provided for a method of recovery of the tax paid by the institution from the depositors, it could not ignore the questions whether the tax must be borne by the institution in order to avoid a flight of deposits to stock institutions; whether the tax exceeds the value, if any, of the assumed ownership interests of depositors and therefore deprives them of property without due process of law; whether it does not result in discrimination against depositors in mutual institutions as compared with those in institutions having capital stock; whether the statutes do not impose discriminatory double or triple taxation upon the depositors; whether the provision for recoupment or reimbursement of the tax is illusory and unavailable as a practical matter and results in the real incidence of tax upon Appellant itself, depriving it of property without due process and denying its depositors and itself the equal protection of the laws contrary to the Fourteenth Amendment as well as infringing the fiscal powers of the Federal government; and all of the other questions involved.

These are all matters going to the merits rather than to the substantiality of the questions raised. The questions are still as substantial in the case at bar as they were in *Society for Savings* and *First Federal*. They are questions which the Ohio Department of Taxation should be glad to have definitely and finally considered and determined by this Court, since they likewise concern many other financial institutions in the state and involve large sums of money in each tax year. They affect the fiscal operation of the federal government.

The Board of Tax Appeals, in its entry, not only recognized that the constitutional question was "interesting," but that if Appellant's contention is correct, then the statutes providing for the assessment of the tax are unconstitutional. This question has been at all times present and asserted since the inception of the administrative proceedings before the Tax Commissioner wherein Appellant applied for review and redetermination of the 1957 assessment.

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FILED
FEB 11 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 537.

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,
Appellant,

v.

STANLEY J. BOWERS,
Tax Commissioner of Ohio
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

PETITION FOR REHEARING.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 537.

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,

Appellant,

v.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

PETITION FOR REHEARING.

Petitioner prays that this Court grant rehearing of its order of January 19, 1959 granting the motion to dismiss, dismissing the appeal and denying certiorari, that probable jurisdiction be noted, the case heard on its merits, the judgment of the Supreme Court of Ohio reversed and for such other relief as may be proper in the premises.

The questions involved in the case at bar are essentially the same and are more substantial than in *Society for Savings* and *First Federal*, 349 U. S. 143, 75 S. Ct. 607, in which probable jurisdiction was noted and after argument the judgments of the Ohio Supreme Court were reversed. Those cases originated with Claims for Refund of taxes paid for five years; the case at bar by the alternative procedure of Application for Review and Redetermination of a similar assessment, for one year (1957) only,

before payment of the tax. From that point on the procedure was the same in all three cases as were the questions involved.

The monetary amount involved in *Society for Savings* was $126,115.96, an average of $25,223.19 per year or a little more than the annual amount here involved; the amount of refund for five years involved in *First Federal* totaled $20,540.41, or $810 more than the amount for one year in the case at bar.

The rate of tax in the years involved in *Society for Savings* and *First Federal* was .002, whereas this case involves a tax of .002 (under R. C. § 5707.03 (D)) plus .003 (under H. B. 945) or a total of five mills per dollar on the entire surplus.

The statutes involved in *Society for Savings* and *First Federal* had been construed by the state court as impliedly imposing the tax on the ownership interests of depositors in surplus whereas thereafter the law was amended to make express the implication construed into the former law by the state court.

Now as well as before amendment the law makes no provision for collection by the state from the depositors should the institution fail to pay—another basis of the opinion in *Society for Savings*, 349 U. S. 143 at 151, 75 S. Ct. 607 at 612.

Taxation of the surplus of a mutual institution as against so-called ownership interests of depositors therein results in gross discrimination against them as compared with deposits in non-mutual institutions in competition with them in the same business—banks and savings and loan associations having capital stock and unincorporated banks—the surplus of which inures to the shareholders, partners or proprietors respectively, and not to the depositors. Assuming the case of such an institution having

taxable and exempt deposits and surplus in the same amounts as Appellant, the tax collectible by the institution from its taxable depositors would have been only $96,422.92 ($48,211,460 x .002) as contrasted with the taxes of $96,422.92 on deposits, plus $19,730 on surplus—a total of $116,152.92—in the case at bar. By reason of that discrimination the institution would not dare exercise the right of collecting from its depositors the tax on their "ownership interests" under pain of losing its deposits to its neighboring stock institutions. How can it be said that the nominal right to recover the tax from depositors is not illusory?

Even if the fallacy of the legislative provision for recovery of the tax from depositors be disregarded, the legislature has not and cannot cure the defect that the tax is imposed on "ownership interests" of depositors which they cannot withdraw and which have no other value to them—*Society for Savings* and *First Federal*, 349 U. S. 143, 150, 75 S. Ct. 607, 611; *Collett vs. Springfield Savings Society*, 13 O. C. C. 131 (affirmed 56 O. S. 776). In *Barrett v. Bloomfield Savings Institution*, 64 N. J. Eq. 425, 54 A. 543 (affirmed 66 N. J. Eq. 431, 57 A. 1131), in which the court enjoined the proposed dissolution of a savings bank, the court said (p. 553):

> "with regard to the division of the surplus. There is indeed, no known mode of dividing a surplus of a savings bank, when such division becomes necessary, except among the bona fide depositors at the time of the dissolution. *Morristown Sav. Inst. v. Roberts*, 42 N. J. Eq. 496, 8 Atl. 315. But it does not follow that such division is just and equitable. It is a rule of convenience and necessity, not of equity. Consider, in that connection, the temptation of eleventh-hour people to come in as depositors in anticipation of dissolution. In fact, I am confirmed in the view I stated

at the argument, that the attempt to make an equitable division of the surplus of a savings institution, such as we have to deal with here, presents an insoluble problem. That surplus is the result of the surplus earnings of all the money that has been deposited by all the depositors from the beginning of the bank. It is well known that many of those have already withdrawn, and thereby, as it has been well said, have abandoned their share in the surplus; but it by no means follows that the equitable rights of those who remain are any greater by such abandonment than they would have been without it. Then, of those who remain at the end, some have been depositors for a longer time than the others. The present case presents an example of that. In my opinion, the true status of a surplus is that it is held by the institution in trust for the benefit of the immediate community in assisting to maintain and perpetuate the existence of the institution."

There were in Ohio in 1957, approximately 480 mutual savings and loan associations and savings banks, none of which had issued any stock. The questions involved herein are of importance to all of such institutions; before the expiration of five years from the effective date of the amended statutes here involved, they may be expected to file claims for certificate of abatement of the taxes paid on account of the so-called depositors' interests in surplus, reserves and undivided profits, under R. C. § 5703.05 which provides in part as follows:

"(B) * * * the commissioner has the authority on written application of any person, firm, or corporation claiming to have overpaid to the treasurer of state at any time within five years prior to the making of such application any tax payable under any law which the department of taxation is required to administer, or on his own motion investigate the facts and make in triplicate a written statement of his findings, and, if

he shall find that there has been an overpayment, issue in triplicate a certificate of abatement payable to the taxpayer, his assigns, or legal representative which shows the amount of the overpayment and the kind of tax overpaid. * * *"

It is important that an authoritative determination of the constitutionality of the statutes be made by this Court presently rather than await a time when far greater amounts may have accrued and been paid and be subject to abatement on the ground that the amended statutes are unconstitutional.

We submit that for the reasons herein and in the Jurisdictional Statement in the case at bar, rehearing should be granted, that Mr. Justice Harlan should be joined in his opinion that probable jurisdiction should be noted, the case heard on its merits and the judgment of the state court reversed.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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